No. 10325

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

H. HARRY MEYERS,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE CHARLES H. LEAVY, *Judge*

BRIEF OF APPELLEE

J. CHARLES DENNIS,
United States Attorney

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STATEMENT OF THE CASE

In this case Appellant H. Harry Meyers is appealing from his conviction on retrial, as to him alone, of the case involving *Joshua F. Simons, et al v. United States*, affirmed as to three co-defendants by this Court on April 21, 1941, 119 Fed. (2d) 539. The jury in the first trial disagreed as to defendant Meyers while convicting four others and a fifth having pleaded nolo contendere (Tr. 70).

Appellant's brief states the jurisdiction of the Court and gives a fairly accurate abstract of the thirteen count indictment, which names nine defendants. The first ten counts charge defendants used the mails to further fraud in a scheme involving oil-lease sales promotion in the State of Washington in violation of Sec. 338, Title 18, U. S. Code; Counts XI and XII charge violations of Sec. 17 (a) (1) of the Securities Act of 1933, Title 15, U.S.C.A., Sec. 78q, as amended, in the operation of such scheme; and the thirteenth count charges conspiracy to commit violations of such statutes.

The scheme devised and placed in operation by the defendants is described in detail in the first count of the Indictment (Tr. 3).

The retrial of defendant Meyers started on October 5, 1942, before a jury, the Honorable Charles H. Leavy, District Judge, at Tacoma, Washington, presiding (Tr. 71). On November 12, 1942, the jury found Meyers guilty on the first ten counts and not guilty on the last three (Tr. 71). On November 21, 1942, the defendant's motion for a new trial (Tr. 72) was overruled (Tr. 80) by the Court after argument, and sentence was imposed upon appellant to which he duly excepted (Tr. 80).

SUMMARY OF THE EVIDENCE

Appellant's statement of the evidence is sketchy and incomplete. His brief does not argue the claim of insufficiency of the evidence to support the verdict included in his assignment of errors (Tr. 142-3). Nevertheless, we deem it essential to briefly summarize the more important phases of the evidence to show the overwhelming character of the proof so the Court may judge from the whole record whether any claimed errors were prejudicial to the extent of denying substantial rights to appellant or were simply technical errors in rulings on admissibility.

Prior to 1934 defendant Broome had acquired the assignment of approximately 135,000 acres of oil and gas leases in an area located in Eastern Washington known as Frenchman Hills. Broome paid no money or other valuable consideration therefor except to obligate himself to drill for oil or gas, and the assignor reserved a royalty interest in the event of production (Tr. 210-12; G. Ex. 58). Broome interested appellant Meyers who brought into the enterprise his intimate friends, the defendants William Markowitz and J. F. Simons (Tr. 196-9, 883, 1329).

A tentative agreement for the exploitation and sale to the public of interest in these leases was signed

by Meyers and others of the defendants (G. Ex. 8; Tr. 187-93) about March 16, 1934, according to Meyers (Tr. 1329). It outlines the plan of operation in selling the leases in fractional units to the public. The plan was modified as to some of its details, but in substance was followed by the defendants.

This exhibit is of unusual interest. First, because it is rare indeed that documentary evidence of the basis of a conspiracy is obtained; and, second, because it shows that the real purpose of the enterprise was not to attempt to develop oil, but to create a sales market, the drilling serving only as a sales promotion auxiliary.

The agreement provides in substance for the formation of three privately owned stock companies, No. 1 being designated as the Holding Company, which was to hold the leases; No. 2, being designated as the Oil Company, which was to sell the leases to the public; and No. 3 being designated as the Development Company, which was to do the drilling.

The text of this agreement shows that the drilling was to be financed from the proceeds of the sales to the public. With reference to the Holding Company, the exhibit states:

> "The main purpose of No. 1 will be to procure as much publicity as possible, together with material of every nature that might further the civic

interest, as well as supply the selling organization with ammunition." (Tr. 189).

Relative to No. 2, the Oil Company, the agreement recites:

> "In order to obtain the best results, No. 2 should work in close harmony with No. 1, and with No. 3, particularly so as to gage its activities in keeping with the progress of the development of No. 3." (Tr. 190).

As to No. 3, the Development Company, which was to do the drilling, the agreement states:

> "The operations of this company is a very essential part of our program, as they will have to constantly keep a development program going consistent with the Sales Department. Their purpose is to create as much public interest as possible, and should work very closely with the management of No. 2 for obvious reasons." (Tr. 193).

Shortly after the signing of this tentative agreement, and prior to March 19, 1934, the appellant Meyers, together with William Markowitz and J. F. Simons, came to Seattle to enlist local support for the project. They arranged for the support of the Northwest Oil and Gas Association which was composed of an active group of local citizens attempting to find oil in Washington.

A meeting was held by the three with the Directors of the Association at which Meyers was spokesman. He stated that he was connected with the en-

gineering firm of Strauss and Meyers who were building the Golden Gate Bridge at San Francisco. There was no such firm (Tr. 682). He introduced Simons and Markowitz, whom he sponsored as his financial agents who would handle the promotion end of his program. He said that they proposed to drill a number of wells in the state, and would help any worthy project that might be under way. Meyers also personally told two of its members that if they undertook the drilling in Washington, it would be completed even if he personally had to do it (Tr. 223-6).

As a result of these representations the Directors of the Association passed a resolution dated March 19, 1934, endorsing the enterprise. This resolution was later widely used in advertising matter and series of "Broadsides" (beginning with G. Ex. 21) in connection with the sales campaign. The endorsement was used during the selling campaign, but was rescinded by letter of March 17, 1936 (Tr. 222).

The financing through loans mentioned in G. Ex. 8 (Tr. 189) as being necessary in the conduct of the deal until it should be self-supporting through sales was obtained from appellant Meyers and defendant Louis Roth. On March 26, 1934 at Los Angeles, Meyers drew two checks for $5,000 each payable to the Atkins Corporation, and delivered them to Mar-

kowitz and Simons, who controlled the corporation (Tr. 1013, 1015, 1018). On the same date Louis Roth purchased a cashier's check for $10,000 payable to himself, and endorsed it over to the same corporation (Tr. 992-3). These checks were deposted on the same day to the credit of the Atkins Corporation in Los Angeles, and later were withdrawn and deposited in another Los Angeles bank by the Atkins Corporation (T. 1012-13; 1042-44).

On March 27, 1934, Meyers, other defendants and accomplices at Los Angeles, organized three Washington corporations through which to promote the sales to the public. These corporations were:

No. 1—Peoples Gas & Oil Corporation, for the purpose of holding the leases.

No. 2—Peoples Gas & Oil Company, the sales organization to sell lease units to the public.

No. 3—Peoples Gas & Oil Development Company, to carry on a drilling program.

Articles of incorporation for each were filed in Olympia, Washington, April 4, 1934 (G. Exs. 1-4, 11-13). For convenience these three companies will be respectively referred to as the "Corporation," the "Oil Company" and the "Development Company".

Each of the three companies as originally organized had a capital stock of 640 shares of $1.00 par

value. The stock in each of these companies was issued in April, 1934, as follows: (Tr. 216)

Atkins Corporation (J. F. Simons and William Markowitz)	224 shares
H. Harry Meyers	112 shares
Louis Roth	56 shares
B. Blank	56 shares
William A. Broome	160 shares
M. M. Black	32 shares
TOTAL	640 shares

On or about April 11, 1934, Broome assigned to the Corporation the leases which he had held (G. Ex. 9; Tr. 194). A sales agreement was executed between the Corporation and the Oil Company providing for the sale by the latter of lease units to the public on the basis of 40% of the proceeds to the Corporation and 60% to the Oil Company. The Oil Company was to devote up to 62½% of its 60% for development expenses (Tr. 217). The agreement originally appeared in the minute books, but was removed with other alterations of the records about a year later in April or May, 1935 (Tr. 216-17, 984) when the representation started that Meyers personally was paying all the drilling expenses.

Shortly after the companies were organized the offices were set up in Seattle, Washington. The origi-

nal $20,000 advance by Roth and Meyers was reflected on the records of the Oil Company in Seattle, and checks were drawn against it for organization expenses, and all other expenses of all three companies until that fund was finally exhausted by June 25, 1934 (Tr. 942-3, 952, 1044).

The defendant J. F. Simons instructed the bookkeeper that four notes should be set up on the books of the Oil Company for the $20,000, that is, the books were to reflect that it owed H. H. Meyers, B. Blank, Louis Roth and the Atkins Corporation each $5,000 (Tr. 944-5).

Before the $20,000 was exhausted the Oil Company opened an account with the Peoples Bank & Trust Company in Seattle. To that account was transferred the remaining portion of the $20,000 that had been deposited in the name of the Atkins Corporation of Los Angeles, and in the Seattle account was also deposited money that began to come in from the proceeds of the sales of the leases. The account was later transferred to the Seaboard Branch of the Seattle First National Bank (G. Ex. 263).

At Seattle the offices of the three companies were in the same suite. Meyers and other principal defendants officed in this suite. All office employees who

worked for all three companies were hired by the defendant J. F. Simons, who also dictated the minutes of all three companies (Tr. 199-200, 203, 213, 983). The books and records of all three companies were kept under supervision of defendants J. F. Simons and William Markowitz, although the latter did not actively participate until 1935 (Tr. 935-6).

The Corporation at no time had a bank account, all of its expenses being paid by the Oil Company (Tr. 941, 952). During April, 1934 to July, 1935, the Development Company had no bank account (Tr. 941), and all of its expenses were paid by checks drawn by defendant J. F. Simons first on the Atkins Corporation account at Los Angeles mentioned, and later on the account of the Oil Company at Seattle (Tr. 986).

After July, 1935, although a bank account was opened and maintained by the Development Company, J. F. Simons and William Markowitz continued to examine expenditures made by the Development Company, and all checks issued by it were ordered submitted to them before being issued to payees (Tr. 952). So, too, the drilling equipment for the Development Company was purchased under the close personal supervision of the defendant J. F. Simons during the fore part of 1934 (Tr. 447-449).

Even at this early stage of the proceedings, that is, in April, 1934, appellant Meyers detailed his importance and his intimacy with J. F. Simons and William Markowitz saying, too, that he was president of the Strauss Engineering Company, that he was building the San Francisco Golden Gate bridge, that he considered himself worth well over $15,000,000 (Tr. 195-9).

Immediately upon opening the offices in April, 1934, the sales campaign was started. The promoters brought from Los Angeles to Seattle a group of high-powered salesmen called "prima donnas", and another class of agents called "bird dogs", circulated through the city looking for prospects whom they in turn referred to salesmen who contacted the prospects by telephone. The more interested ones were later contacted by the "prima donnas" (Tr. 200-1, 206).

This high-pressure selling campaign was not very successful, and was abandoned after a few weeks, and the telephone room was closed. The high-powered salesmen in the main returned to California (Tr. 201). The selling plan was changed, and the project was advertised as a civic enterprise employing local salesmen (Tr. 285-286).

A great number of the local salesmen were em-

ployed from all classes of people who were first sold on the project themselves, bought leases and were thereafter induced to sell to others on a 20% commission. All local salesmen who testified at the trial purchased leases for themselves or their families (Tr. 258, 330, 337, 348, 363, 367).

The Seattle office remained the headquarters, but soon branch offices were established at Tacoma, Spokane, Yakima, Aberdeen and other towns in Washton (Tr. 243), as contemplated in the tentative agreement (Tr. 190).

Sales publicity was carried on primarily by sales meetings which all salesmen were required to attend, where they were trained and instructed; by public meetings, widely announced and advertised, which salesmen were required to attend, and to which the public was invited and urged to attend; and by printed advertising matter distributed both to the public and to the salesmen, and the sales material furnished salesmen for their kits.

Sales meetings were held three times a week at first, and later daily in Seattle and the larger branch offices, and salesmen were required to attend at least four times a week (Tr. 243, 348). William Markowitz as general manager, J. F. Simons and others,

including Broome and Meyers, would speak at these meetings (Tr. 243, 300, 309).

Public meetings were held once a week in Seattle, Tacoma, Spokane, Yakima, Aberdeen, Vancouver, Olympia and Walla Walla (Tr. 243). They were addressed regularly by defendant Broome with the assistance of various other members of the organization, and occasionally by J. F. Simons and Meyers (Tr. 243, 310). Meyers was also present at other public meetings where he did not speak (Tr. 517-8, 521).

Advertising matter furnished branch managers and salesmen included the "Broadsides" (G. Exs. 21, 26-31), which the branch managers were told to make their "Bible" of instructions to their salesmen, the salesmen in turn being instructed to use it as sales material (Tr. 245-6).

With reference to the broadsides, a conversation between Meyers and witness Duncan in San Francisco in 1934 is illuminating. Mr. Duncan testified as follows:

> "He (Meyers) laid a broadside similar to this out on the table and asked me what I thought of it. And I ran through it and read the various things in it, looked it over casually, and I said, 'Well, it looks like 'blue sky' to me,' and I said 'Aren't you afraid of the Better Business Bureau?' And he said, 'well it was perfectly within

> the law.' I said, 'Do you really expect to find oil there?' He said, 'You never know what you will find.' I said, 'Well, suppose you don't find oil?' in the first place, — He said, however, they were not particularly interested in finding oil; what they were interested in was selling shares. And I said, 'Suppose you don't strike oil?' 'Well', he said, 'we will just keep on boring.' That was the purport of the conversation * * *" (Tr. 877-8).

G. Ex. 33 is an example of a salesman's kit, containing a copy of the Broadside, letters of endorsement, "The Northwest Gas and Oil World", a reprint of an article written by Milton Hurwitz for the magazine "Commerce and Industry" (G. Ex. 22), newspaper stories currently furnished and large printed sheets of news clippings called clip sheets. J. F. Simons presented the clip sheet at a salesmen's meeting in June, 1935, telling the salesmen he had worked hard to obtain this publicity, and that it would be a great selling aid (Tr. 247-8). Salesmen were instructed to tell their story based on the printed matter and on the statements made to them by company officials either individually or at the meetings (Tr. 313).

After the arrangements between the promoters and the Northwest Oil and Gas Association terminated so that they could no longer have copies of this paper issued to purchasers of leases and prospects, the promoters started their own organ called the "People's

Progress", and circulated it among their investors and prospects. G. Ex. 35 is a complete volume of that publication, which is not reproduced in the transcript because of its bulk. It was used extensively as sales material (Tr. 250).

The keystone of the lease selling campaign was appellant Meyers. It was based on representations concerning his fine business record and standing in the industrial and financial world, upon his reputed great wealth, his philanthropic character, the fact that he was a great natural resource developer for the public benefit, that he was principally responsible for the building of the Golden Gate Bridge, his special interest in the State of Washington which had caused him to undertake this drilling development which he was to guarantee and pay for out of his own pocket in order to thwart the hostile opposition of the major oil companies, and his often repeated promise and pledge that he would continue the Frenchman Hills drilling operations out of his own ample funds until he had given the field a thorough and adequate test. (Tr. 240-1, 250-2, 285, 288, 291-3, 295, 310-1, 337, 339, 342, 344, 346, 349-51, 354-55, 359-61, 367-70, 372, 374-5, 381, 401, 462-3, 489, 491, 493-4, 498-9, 517-9, 521, 523-4, 534, 539, 1392).

Some of the major misrepresentations are as follows:

1. That Meyers was a man of great wealth, a millionaire or multi-millionaire, a great financier and a philanthropist (Tr. 196, 240, 258, 277, 281, 284, 287, 295, 355, 360, 367, 370, 372, 375, 381, 462, 489, 491, 524, 534, 1392).

Meyers was present when such statements were made (Tr. 239-40, 293, 300, 309, 368-70, 375, 381, 399, 462, 491, 496, 509, 518, 521, 524). Meyers also made similar representations personally, telling one witness he considered himself worth well over $15,000,000 (Tr. 196-199, 207), and other witnesses that he was extremely wealthy (Tr. 281, 295).

Meyers was not a millionaire nor a wealthy man (G. Ex. 110-B). His 1932 income tax shows he did not submit any report for taxable income for the preceding year, and his returns for the years 1932-39, inclusive (G. Exs. 110-B to 110-I, inc.) show only meager income during those years except for what he obtained from Strauss, the builder of the Golden Gate Bridge. In 1920 when he was represented as having shortly before returned from Europe with a very large fortune he was unable to pay a note for $6,000, and was obliged to ask for a number of

extensions (G. Exs. 104-6; Tr. 905-8). Meyers admitted on cross examination that during the period 1932 to 1939, covered by the income tax returns, he had no income except from Strauss (Tr. 1388).

The only evidence that he could refer to were two inconsistent statements he furnished government agents (Tr. 886-7). In Meyers own case he failed to present any evidence except his own word that he was a man of wealth. He also admitted to the agents that it was not true that he was a very rich man, and that his middle name was "Make A Dollar" (Tr. 882, 884, 1150, 1170).

Likewise he denied on the witness stand that he had ever told anyone he was a millionaire or multi-millionaire, or that anything of the kind was ever said by him (Tr. 1338).

2. That he was the head of the company that was building the Golden Gate Bridge, and was primarily responsible for its being built (Tr. 197, 241-2, 281, 338, 349, 360, 365, 366, 372-5, 401, 462, 498, 882, 1149, 1392).

Meyers owned no stock and had no interest in the Strauss Engineering Company, nor any other company concerned in the building of the bridge, nor was he an officer or director in any company interested

in building the bridge (Tr. 682). He so admitted (Tr. 1324). The only connection Meyers had with the Golden Gate Bridge is that he was able to obtain contracts with Strauss, the chief engineer, on a percentage basis of the fee Strauss would receive as chief engineer (Tr. 574, 580-4).

Meyer's explanation of D. Exs. A-56, A-57, A-58, representing the contracts, was very unsatisfactory as to showing how he was entitled under the first two exhibits to the $220,000 which was called for by the latter exhibit (Tr. 1354).

Meyers did practically nothing toward forwarding the bridge or Strauss' appointment as chief engineer (Tr. 551-60, 579, 587, 613-5, 621-80, 876; G. Ex. 98, Tr. 868). Meyers himself on cross-examination could not relate a single material thing he had done to further the Golden Gate Bridge project, although he was pressed closely and hard on the subject (Tr. 1344-53, 1356-1358).

Strauss is dead (Tr. 584). It is evidently true that late in 1928 and early in 1929 he had apprehensions about his chances of appointment as chief engineer. At that time Meyers found his opportunity of working his way into Strauss' confidence and cause him to believe Meyers could assure the appointment

(D. Ex. A-52, Tr. 574; D. Ex. A-57, Tr. 581; and G. Ex. 98, Tr. 866). Such anxiety on Strauss' part was unnecessary (Tr. 670-671, 676).

3. That the project was amply financed, Meyers was guaranteeing the money, and later that he was furnishing the money out of his own pocket, and that an adequate test would be given to the territory, more than one well would be drilled if required, and that they might have to drill eight or ten wells (Tr. 311, 344, 347, 369, 518, 525, 534, 539; G. Ex. 35, issue of Jan. 10, 1936, Pg. 3, Column 2; Tr. 242-3, 307, 346, 361, 368, 373, 489, 494, 521; G. Ex. 32, clippings of "Wenatchee Daily World," September 1 and 15, 1934; "Puyallup Valley Tribune," March 8, 1935; "Tacoma Times", May 3, 1935; "Seattle Post-Intelligencer", 1934; "Spokane Press", September 4, 1935; "Aberdeen Daily World", August 29, 1935; "Commerce and Industry", November, 1934).

Meyers admitted that representations to the public first were that he was backing the project (Tr. 1372). He further admitted that later on in the sales campaign it was represented that he was to personally pay for the drilling with his own funds without any prospect of recompense except in the event of oil (Tr. 1373-4, 1378).

Meyers appeared at both sales and public meetings himself making talks, and also heard the various representations made and made representations himself (Tr. 239-43, 248-50, 258, 274-5, 277, 279, 289-94, 300, 309-10, 337-9, 349-51, 359-61, 368-75, 381-2, 462-3, 510, 517-9, 521, 523-4, 533, 1374).

Meyers himself admitted that he did nothing to counteract the representations (Tr. 1374-5).

4. Subsidiary representations were that Meyers' hobby was the development of natural resources (Tr. 309-10); that he had a special interest in the State of Washington because of his wife who was from Tacoma (Tr. 240-1, 310, 344, 491); that William A. Broome was a geologist and petroleum engineer of great experience (Tr. 248-50, 277, 287, 290) and that Broome initially had shown Meyers good geological reports of the territory, but that Meyers had not relied only on them or on Broome, but had sent up his own geologist to make an investigation, and had received a favorable report (Tr. 198, 344, 350, 360, 368, 524).

As a matter of fact, Meyers admitted that he knew Broome was not a geologist (Tr. 1361). Meyers was also told of admissions by Broome that he was not a geologist or connected with any successful oil venture (Tr. 296-7). Meyers also admitted that he did not

have any geologist, and had sent none up (Tr. 1360-1).

Besides the representations as to Broome being a geologist and his experience, great reliance was placed in the sales campaign upon the advisory board of eminent geologists who were represented to be guiding the development (G. Ex. 21, 26). This advisory board was entirely fictitious, and the men purporting to compose it were not acting in an advisory capacity and had not consented to their names being used, and when they heard of their names being used, they immediately wrote requesting that their names be withdrawn (Tr. 526-7, 1123, 1131-2).

The defendants synchronized the representations by stating that the project was founded upon the basis of "Men, Money and Machinery." (Tr. 365). "Men" referred to Meyers, Broome, Markowitz and Simons (Tr. 291). The public was told of their prior achievements and standing which guaranteed the integrity of the program. With reference to "Money", it was represented that Meyers was guaranteeing, and then later was paying, for the entire program out of his own pocket, he being immensely wealthy and well able to do so (Tr. 240, 310, 335, 370). As to "Machinery", it was represented that they had the best possible equipment (Tr. 240).

Although they stated that any oil venture was a

speculation and a gamble, the claim was made that by virtue of the men, the money and the machinery, and the fact that a thorough, adequate test of the structure was assured, that virtually every gamble had been removed from the program; that Broome was 99% sure of oil; that the production was likely to be greater than at Toteco, Mexico, where the original well had come in at 150,000 barrels a day (Tr. 249); and that anyone who would not invest, if he could possibly do so, should have his head examined (Tr. 310-11, 335, 341, 345-6, 351, 490, 519-20, 522, 524).

In traverse of representations made in the sales campaign as to the prospects of oil or gas on Frenchman Hills, the Government introduced testimony of Dr. Charles E. Weaver, head of the Department of Geology at the University of Washington at Seattle (Tr. 420-36), and Mr. Walker S. Clute, consulting petroleum geologist and engineer of Los Angeles, (Tr. 436-42), both of whom testified in substance that they had made examinations of the territory concerned and found conditions, as far as ascertainable, altogether unfavorable for petroleum oil or gas in commercial quantities.

Further, Mr. Ralph Arnold, consulting petroleum geologist at Los Angeles, who had been employed by appellant and his associates to make an examination

for them in August, 1936, after all the leases had been sold and the Government investigation had started, testified that he had advised appellant Meyers that oil on Frenchman Hills was unlikely and if there was any gas it was probably a marsh gas (Tr. 464-6, 469).

Dr. Weaver also testified that he had found more than half of the land covered by the leases sold to the public off any geological structure capable of holding oil or gas if it existed, and less than half of the land on such structure (Tr. 432).

In the initial stages of the sales campaign no effort was made to conceal the fact that the project was to be financed from sales (Tr. 250-1, 300) with Meyers backing it (Tr. 240). But in March or April, 1935, the story was changed, and instructions were issued for the public to be told, and they were told, that all the bills of the Development Company were being paid by Meyers out of his own pocket(Tr. 251-2, 300), and also that the leases had been purchased from Meyers for $65,000 (Tr. 251-2).

The effect of the change was to tell the public that there was no connection between the Oil Company and the Development Company, and that drilling was not dependent upon the Oil Company because Meyers was paying for all drilling (Tr. 251, 1379).

Concurrently with, or prior to, the change of the story the records of the companies were changed (Tr. 987). The change in the records was made because of an investigation by the State (Tr. 251). The records were altered in April or May, 1935, by the bookkeeper for all the companies on orders which Markowitz and Simons verified (Tr. 214, 948-9). The certificates and stubs evidencing the original issue of the stock in all three companies were removed from the certificate books, and the stock books were reconstructed in their present form (Tr. 215-6, 954; G. Ex. 176). The effect of these manipulations was to have the books reflect that Meyers and Broome were not interested in the Oil Company or the Corporation in support of the story that the companies were independent (Tr. 260, 946). The note record showing the original loan of $20,000 was also changed, and the minute books and records of the Development Company were altered to show an execution of a purported demand note payable to Meyers in the sum of $65,000, the purported consideration being the transfer of the oil and gas leases by Meyers to the Development Company (Tr. 948-9). This was entirely fictious as no sum had been paid for the Development Company's acquisition of the leases (Tr. 211), nor did the original entries so show (Tr. 950, 955, 979).

At the same time the original books of account of the Corporation and Oil Company were altered to show the execution by the Corporation to the Development Company of a purported note in the sum of $65,000 in consideration of the transfer by the Development Company to the Corporation of the said leases (Tr. 949).

The original entries on these books reflecting the true inter-company transactions of the payment of all the operating expenses of the Development Company by the Oil Company were removed (Tr. 949-50), and the inter-company transactions were transferred to the books of the Corporation and offset against the purported $65,000 note (Tr. 950). So, also, all reference to the original contract between the companies providing for the proceeds of sales to be used for the payment of drilling operations was removed. Meyers knew of these changes (Tr. 206, 1372).

In May, 1935, the Corporation and Oil Company were merged retaining the name of the Oil Company, and from then on it was represented to the public that the Oil Company and the Development Company were separate and distinct companies, William Markowitz and Simons being the Oil Company, and Meyers and Broome, the Development Company (Tr. 260, par. 4).

Salesmen were instructed at the time a sale was made and the contract signed that the purchaser must sign an assignment and agreement whereby the purchaser assigned his acreage to the Development Company under a so-called "Community plan of development" (G. Exs. 10 A-F, Tr. 194; 244, 270-1). The assignment and agreement to the Development Company provided that the Development Company would drill the necessary test wells and develop the field, retaining 22½% of any oil produced, and pay the assigning purchaser 65% thereof (G. Ex. 10-B). During the sales campaign the investors were told that this form of lease afforded greater protection to them than would stock (Tr. 253).

The Oil Company started selling leases in April, 1934 at $10 per acre, arbitrarily raising the price from time to time until leases sold for $35 per acre, which was the highest price at the close of the sales campaign in April, 1936 (G. Exs. 21, 26-31, P. 31; Tr. 246, 294-5). The actual value per acre was 50c to $1.00 (Tr. 232). The price raises were based upon fantastic representations as to oil bearing structures and gas encountered in the drilling operations and momentarily expected oil production (Tr. 246-7).

Approximately 35,000 contracts were sold, the

majority on a monthly installment basis, the contracts containing an option clause which was used as a basis for obtaining further purchases at the time of an impending price raise (Tr. 247).

Shortly before the sales campaign ended J. F. Simons, William Markowitz and Meyers attended an SEC meeting in Washington, D. C. in connection with an inquiry of that Commission concerning the activities of the companies (Tr. 1136). Meyers was present at the hearing, and Markowitz made statements to the effect that Dr. Meyers would drill the well, and that it made no difference how much time and money it took; that Meyers had sold the leases to him and his associates for $65,000, which had been paid; that not one cent from the sale of leases was used to pay Dr. Meyers; that when they first came from California they had $100,000.00, $65,000.00 of which was given to Meyers for the purchase of leases, and that the entire $100,000 had been used before the Oil Company started functioning; that Meyers would drill the well until oil was found or until he was advised by experts that no oil was there (Tr. 1136-41).

Meyers personally told the head of the Commission that he was going to drill until he found oil or was so told by experts that no oil was there, and that up to March, 1936, he had spent $200,000 in drilling

operations, and that not one twenty-five cent piece had been furnished to him by the Development Company, and that he had been paid $65,000 for the leases (Tr. 1138-40).

Shortly after that, in April, 1936, the sales campaign closed (Tr. 329, G. Ex. 35, Issue of April 1, 1936, Pg. 1). The explanation given the salesmen for the closing of the campaign was that all of the leases intended for the people had been sold, and that the defendants would hold the rest for themselves (Tr. 329).

At the close of the campaign the gross sales totaled $2,855,523.50, mainly on installment contracts from over 30,000 investors (Tr. 1165). The branch offices were kept open until June 15, 1937 to continue collections. Total collections from investors up to October 22, 1937, when a receiver was appointed for the Development Company, was $1,904,536.28 in cash, and in securities, merchandise and services, $38,-865.28, making a grand total of $1,943,401.56 (Tr. 1165-7). This total includes $45,338.44 which was collected as execution fees (Tr. 1167).

In June, 1936, the sales managers were told that Meyers, Broome, Markowitz and Simons had decided to increase the stock of the Development Company

from the original 640 shares for the purpose of having the investors convert their lease holdings to shares in the Company at the rate of eight shares for each acre held (Tr. 253).

G. Ex. 48 (Tr. 383-91) shows the form of general letter mailed to leaseholders to induce them to transfer. This finally resulted in Markowitz and Simons holding 270,000 shares of the Development Company, which was sufficient to control that company and enable them to appoint a board of directors from investors, which they did, and to direct the company's affairs as they pleased (Tr. 254, 256, 539-40; G. Ex. 13). No stockholders meeting was ever held (Tr. 258; G. Ex. 13).

The promoters then organized the Peoples Drillers, Inc. on June 9, 1936 (G. Ex. 14; Tr. 1233). All the equipment and assets of the Development Company except the leases, were turned over to this corporation, and that company was to continue the drilling (Tr. 1233). All the stock in the new company was held by Meyers and William A. Broome (G. Ex. 14). This corporation undertook the drilling operations until September 8, 1936, at which time the depth of the well was 2,003 feet, when a cave-in occurred. Drilling did not resume again until November 13, 1936 after Meyers had succeeded in withdrawing

from his drilling obligations (G. Ex. 35, April 30, 1937, Pg. 5).

The withdrawal was arranged through a tripartite agreement dated October 15, 1936, executed by the Oil Company, the Development Company and Peoples Drillers, Inc., which relieved Meyers and Peoples Drillers, Inc. from the drilling obligations and transferred those obligations to the Development Company (Tr. 535-36, 540).

Under this agreement Peoples Drillers, Inc. returned the drilling equipment to the Development Company in consideration for a 12½% royalty interest in any production. The Oil Company transferred to the Development Company its remaining lease contracts receivable in return for a 10% royalty interest in any production. The Development Company to which the investors had transferred their leases for stock, and with a board of directors controlled by Markowitz and Simons (Tr. 254, 256) was granted the right to continue the drilling from the proceeds of the future collections on the outstanding lease contracts (D. Ex. A-40, A-41, A-44).

This agreement included provisions that if the Development Company should become unable to continue drilling, all drilling equipment was to be re-

turned to Peoples Drillers, Inc. (Tr. 1233-34) and Meyers had the option to resume drilling, but there was no legal obligation upon him to do so (Tr. 255, 872, 875, 1383).

Before these contracts were signed there was a meeting of the board of directors of the Development Company on the proposal of the Development Company to assume the drilling operations under the provisions above set forth (Tr. 535).

Markowitz and Simons were present, and Meyers was called in for consultation. The argument was that because Meyers was an old man, and to safeguard the companies' investment and the drilling operations, the Development Company should take over the drilling program, and Meyers would sit in the background to take over if the program failed (Tr. 535-6; G. Ex. 35, issue of Oct. 30, 1936).

The amount of the contracts receivable which were turned over to the Development Company from the Oil Company totaled $535,324.65, face value (Tr. 1166). These accounts were all delinquent, but the Board was persuaded to accept the proposal, believing there would be sufficient money coming in to finish the drilling of the one well (Tr. 540).

The Board, being in doubt, asked for assurance

that the drilling would go on if sufficient money was not collected from the delinquent contracts. Meyers said that he felt himself personally responsible to carry on in such an event, and the equipment would go back to him and his associates so they could carry on (Tr. 536, 540). Markowitz, Simons and Meyers were requested to become members of the Board, but they declined (Tr. 536). The sales managers objected strenuously to the proposal, but they were over-ridden (Tr. 254-5).

Ultimately the collections from the contracts receivable declined until the receipts were insufficient for drilling operations. Members of the Board went to Markowitz and Simons for financial help, but when they were asked to produce $200,000 to finish the well they were told, "To go to hell," (Tr. 541). When they reduced their demands to $50,000, Markowitz and Simons laughed at them, but they did make a small loan, and proposed a new selling program which they had been developing (Tr. 541, 542).

The new scheme thus proposed was called the "Participation Program". It contemplated acquiring leases in several additional sections of the state, and selling what were to be called "participations" of a total amount of $2,500,000 to finance the same, 25% of the proceeds to go to the Frechman Hills operations.

Sales managers were urged to go to work on the plan, but declined (Tr. 256-7).

The "participation" plan was discussed before the board of directors of the Development Company who were required to sign the application for a permit for the "participation" plan before they could obtain any additional funds for the drilling (Tr. 542).

While there is no evidence that Meyers directly participated in this new scheme, he was about the premises while the new program was being developed, and there is no record of his disapproval (Tr. 362).

The first indictment was returned October 20, 1937, and the appointment by the State of a receiver two days later interfered with the new program, although these events did not stop the drilling on Frenchman Hills, which the receiver continued for more than a year from funds received from the investors (Tr. 452, 874).

The receiver and his attorney talked with Meyers in Los Angeles in 1938, and demanded that he fulfill his promise to furnish sufficient money to continue the drilling until a fair test had been made of the original well. Meyers said he would have to consult his counsel, and would advise them later. He later wrote, but the letter in effect said he felt that

there was no legal obligation on his part to furnish any money for drilling (Tr. 872-875).

Meyers admitted that the receiver had made demands for him to continue the drilling, but that he had refused to do so although he did attempt to get the drilling equipment back from the Development Company on the ground that drilling operations had been suspended thus breaching the agreement (Tr. 1383-87). Meyers was not successful in getting the drilling equipment returned to him as shown by *Peoples Drillers Inc. v. Egan*, 4 Wash. (2d) 36, 102 P (2) 242.

In order to harmonize the story that Meyers was paying for the drilling operations out of his own pocket and that none of the proceeds of the sales were used for that purpose, that the companies were separate and independent companies, and in order to make it appear that all of the money for the drilling was coming from Meyers, the promoters and Meyers engaged in devious methods of making funds available to Meyers so that he might ostensibly pay personally for the drilling operations. This, too, was necessary in order to maintain the fiction that he was an extremely wealthy man to whom money meant nothing.

As indicative of these transactions, and showing

that the funds were furnished to Meyers and were not his own personal funds, the evidence showed the following:

1. Before the records were changed as before indicated, the account with reference to the $20,000 capital of the Company which was loaned to it showed four notes for $5,000 each, one of which was payable to Meyers (Tr. 945).

The changed records deleted the name of Meyers with reference to the note, and instead appeared the name of M. M. Black, his attorney, the new note being made payable to Black, but having on it the words, "pay to the order of H. Harry Meyers" followed by Black's endorsement (Tr. 946). This $5,000 was repaid to Meyers with interest (Tr. 947, 957). He so admitted (Tr. 1378). Thus, Black saw to it that the check issued therefor was paid to Meyers.

2. The setting up of the fictitious $65,000 note has already been referred to. It is undisputed that this note was made up in April or May, 1935, when the rest of the records were changed, and that prior to that time drilling equipment and expenses had been directly paid for by the Oil Company, but that after the change in records all such expenses were credited on the note to show that Meyers had in fact

made the advance (Tr. 951, 955, 979).

3. On July 6, 1935, the Oil Company issued three checks as follows:

To B. Blank for $6,321.88 (Tr. 963);
To Louis Roth for $6,321.88 (Tr. 968);
To M. M. Black for $5,617.18 (Tr. 957);

which were in connection with the repayment of the original $20,000 capital with interest. These three checks total $18,260.94.

On July 10, 1935, Louis Roth deposited these three checks in his checking account at the Union Bank & Trust Company at Los Angeles (G. Exs. 227, 228; Tr. 1057, 1069). An employee of the bank testified that Roth, on depositing these checks to his account, requested their collection be expedited (Tr. 1072).

On July 11, 1935, Roth drew the precise amount of this deposit in currency by his personal check (Tr. 1057, 1072). On the same day Meyers deposited $18,000 in currency in his checking account in the Bank of America in California (G. Ex. 197; Tr. 1033-4). On that same date Meyers sent a certified check for $20,000 to the Development Company at Seattle for drilling expenses (Tr. 1039, G. Ex. 219). Previous to this $18,000 currency deposit, the balance in Meyers' account was far less than $20,000.

4. On August 31, 1935, William Markowitz in Seattle cashed two Oil Company dividend checks, one payable to himself for $2,296 (Tr. 972), and the other payable to J. F. Simons for $5,128 (Tr. 973), being a total amount of $7,424. Four days later, September 3, 1935, Meyers deposited in his account in the Bank of America exactly $7,424 in currency (G. Ex. 202; Tr. 1034).

5. On September 21, 1935, J. F. Simons drew a check to "Cash" for $3,000 on the Oil Company's Seattle bank account (Tr. 1038-9). The bank at that time made a recordex photostat of the check, which is G. Ex. 218. A witness, an employee of the Bank of America at Los Angeles, identified this check as having been deposited in Meyers' account in the Sixth & Alexandria Branch on September 24, 1935. G. Ex. 204 is the deposit slip showing the deposit thereof (Tr. 1038).

6. On September 30th, 1935, William Markowitz ordered $15,000 in government bonds through the Seaboard Branch of the Seattle First National Bank for delivery to J. F. Simons at Los Angeles. The bonds were purchased, and delivered to Simons on October 4th, 1935 (G. Ex. 241, 242, 246, 254; Tr. 1099, 1101, 1103, 1105). On the same day that the bonds were delivered to Simons in Los Angeles they were

pledged by Meyers as collateral on a $13,500 loan obtained by Meyers from his Los Angeles bank (G. Exs. 189-91; Tr. 1025-8). The day following, October 5, 1935, after the loan had been granted, Meyers issued his personal check for $13,500 payable to the Development Company at Seattle for drilling expenses (G. Ex. 221; Tr. 1040).

7. On January 20, 1936, the Oil Company issued a dividend check for $1,792 to Louis Roth (fourth check, G. Ex. 164; Tr. 976). Roth deposited this check in his account in Los Angeles on January 23, 1936 (Tr. 1059, 1074). On the same day Roth purchased a cashier's check for the same amount (G. Ex. 237-8; Tr. 1082-5). On the very same day this cashier's check was deposited in Meyers checking account in Los Angeles (G. Ex. 207; Tr. 1036, 1042).

8. On January 20, 1936, the Oil Company issued the following dividend checks: B. Blank, $1,792 (Tr. 964); Dr. Einzig, $640, (Tr. 974); M. M. Black, $5,512 (Tr. 961); making a total of $7,944. On January 24, 1936, these three checks were deposited by Louis Roth in his account in Los Angeles (Tr. 1060). On the same day he purchased a cashier's check for $7,944 (G. Exs. 239, 240; Tr. 1086-7). On this same day this cashier's check was deposited in Meyers'

checking account in California (G. Ex. 208; Tr. 1037). Roth himself brought in the cashier's check and deposited it to Meyers' account (Tr. 1094).

9. On April 16, 1936 Roth cashed his personal check at the Union Bank & Trust Company for $15,000, and took currency (Tr. 1061, 1091). That same day Meyers paid the above mentioned $13,500 loan in currency (Tr. 1025, 1029, 1094).

Six days prior to Roth's cashing his personal check for $15,000 as noted, Roth had deposited two dividend checks of the Oil Company for a total of $45,650, one check being in the amount of $11,200 payable to himself (G. Ex. 165; Tr. 975), the other check being for $34,450 payable to Black (G. Ex. 123; Tr. 962).

The Oil Company's $15,000 government bonds which Meyers pledged as collateral on the above loan were released to Meyers when he paid the loan, and later found their way back to the Oil Company for the records show that these precise bonds were later sold by that Company (G. Ex. 243; Tr. 1098).

It should be noted, too, that Meyers had previously found it necessary to borrow money because on May 6, 1935, he borrowed $25,000 from his bank on collateral security, not further identified in the rec-

ord (Tr. 1023; G. Ex. 189, Tr. 1025).

A summary based on Government Exhibits in evidence showed that the total amount of the Oil Company's checks bearing Roth's endorsement were originally payable as follows:

Louis Roth	$ 96,781.88
B. Blank	10,801.88
M. M. Black	55,371.18
Dr. L. W. Einzig	960.00
Total	$163,914.94

The summary also disclosed that during July, 1935, to April 1936, Louis Roth drew in currency $65,915.94 by way of his personal checks (Tr. 1155).

The total of Oil Company checks cashed for currency by J. F. Simons, William Markowitz, Louis Roth and Meyers was $151,216, which together with Roth's personal check currency transactions makes a total of $217,131.94 (Tr. 1157, 1159).

The only amount the records showed directly drawn by Meyers from the Development Company and the Oil Company is $8,288.19 as reimbursement for executive expenses (Tr. 1160-1).

The books and records of the Oil Company, which was the only one having any operating income, show

the dividend checks were issued in the following names and amounts:

M. M. Black	$ 49,754.00
B. Blank	33,000.00
L. Einzig	12,000.00
Louis Roth	88,720.00
William Markowitz	107,076.00
J. F. Simons	188,850.00
Total	$480,000.00 (Tr. 1167)

The books also reflect additional payments to William Markowitz of $77,616.46 and to J. F. Simons $52,774.51 (Tr. 1168).

It should be remembered that the only contributions shown as a basis for the enormous dividends and payments was the $20,000 original capital, $10,000 of which was furnished by Meyers, and that was repaid. Of those shown as receiving dividends only Meyers, Markowitz and Simons were active in the selling campaigns and actual work. Black, Blank and Einzig contributed nothing, either in money or in services, although they did act as conduits for money flowing to Meyers. Roth may have contributed $5,000 of the $10,000 advanced by Meyers, but he did nothing to forward the enterprise, unless his acting as a conduit for money flowing to Meyers can be said to be of benefit to the enterprise.

ARGUMENT

We discuss the assignment of errors upon which appellant relies in his brief (App. Br. 27) in the numerical order there given.

Strauss Letter — Assignment of Errors Nos. 1 and 2

Government witness John Sparks on his direct examination on behalf of the Government testified generally as to what he knew of the connections of appellant with Mr. Strauss, the Golden Gate Bridge, the firm of Strauss & Paine, Inc., the Strauss Corporation and Strauss Engineering Company, and the amount of money paid by Strauss to Meyers (Tr. 681-5).

On cross-examination appellant, over the strenuous and continued objections of the Government, had this witness identify the signature of Strauss on a great mass of letters, and such letters were offered and admitted in evidence solely upon such identification. There was no proof that the letters were ever delivered, nor that the witness knew anything about the contents of the letters, nor their execution.

The manifest object of these letters, which were clearly hearsay and beyond the scope of the direct examination, was to show that appellant was in fact very intimate with Strauss, and that he was acknowl-

edged by Strauss to be, by inference at least, partially responsible for the construction of the Golden Gate Bridge as well as being connected with some of the Strauss Corporations. The witness being entirely ignorant of the contents and circumstances surrounding their execution could not be examined thereon in rebuttal of the inferences.

Some of the defendant's exhibits thus admitted were communications by Strauss to third parties (D. A-68, A-69, A-71, A-77). It should be borne in mind that Strauss was dead at the time of the trial.

On redirect examination the Government on examining the same witness (Tr. 860), and in rebuttal of the defendant's exhibits mentioned, likewise asked the witness if he recognized Strauss' signature on G. Ex. 98, which he did, and thereupon the exhibit was offered (Tr. 860, 865, 870), and was admitted by the Court over the objection of appellant on the ground that the exhibit was incompetent and hearsay. This letter in effect stated that Meyers had nothing whatever to do with the Golden Gate Bridge nor was in any way responsible for the conception or construction of the Golden Gate Bridge.

It should be here noted that everything mentioned in this exhibit was overwhelmingly proved in the case.

Also, when Meyers himself took the stand he could relate nothing material which he did to further the project nor his relationship to Strauss which would warrant the representations which he had allowed to be made concerning him.

The Trial Court, in overruling the motion for new trial, set forth his reasons for admitting both the defendants' exhibits and the Strauss letter. We quote the Court's language (Tr. 1451-3):

> "Now, the situation that was materially different in this case from that that prevailed in the previous trial was that immediately following the Government's opening statement counsel for the defendant made an opening statement that went into great detail and advised the Jury as to the nature of the proof that would be submitted. On the strength of that opening statement, — and I want to say for counsel for the defense that an effort was made to support the various assertions that were detailed to the Jury, — when they came to making proof in the defense; but by reason of that statement the Court became unusually liberal in the scope permitted on cross-examination, feeling and believing that a great deal of time might be saved. Consequently numerous documents were admitted in evidence then while Government witnesses were on the stand that would not have been within the narrow limits of ordinary cross-examination.
>
> "In the course of such liberal cross-examination the defendant was permitted to introduce a large number of exhibits. I would not attempt to depreciate that; I could not if I would. They were

all more or less documents that would fall within the narrow limits of the hearsay rule, for the purpose of sustaining the position that he later took as a witness, and for the purpose of sustaining the announcement made by the counsel in his opening statement, that he would show an intimate and close relationship with the deceased Strauss. And the matter of that relationship and the belief that the public all placed in it and relied upon the representation in that regard, was a major, — in this Court's opinion, was a major factor in inducing the public to buy these leases that involved almost two million dollars.

"Now, when the defense offered these various documents in evidence some of them were of an extremely intimate character. One, I recall, and I can not give the number of it, was written in longhand by Strauss and he asked that it be destroyed. And the defendant produced it and offered it here in evidence. They had some secret code between them. Strauss being deceased, of course could not be called to refute the contents and effect of these letters; and to have allowed the record to stand in that position with the defendant having made it, would have created a situation, as far as the triers of the facts were concerned, that would have compelled them to resolve the allegation in the indictment that there was an intimate and close relationship between Strauss and the defendant, and that the defendant was one of the major characters in the construction of the Golden Gate bridge.

"Now, the letter written by Mr. Strauss subsequent to that letter which the defense put in, while it evidences considerable animosity, indicates, likewise, that he felt that he had been overreached and that facts had been presented to him as to the importance and significance of this de-

> fendant in the construction of the Golden Gate bridge that he later ascertained were untrue. And, for that reason, I feel that the Court not only acted within its discretion, — and there must of necessity in a case of that nature be a wide discretion with the trial court in the introduction of evidence, — but that it would have been inconsistent in the administration of justice, to deny the admission of the particular document in question, because otherwise you had the record presenting only one side and not giving the whole story."

The Court was clearly of the opinion that in view of all the circumstances, including Strauss' death, appellant's exhibits would have been unfairly prejudicial to the Government in the absence of the admission of the Strauss letter.

The authorities amply sustain the Court's view both as to discretion and as to the propriety of the admission of the exhibit.

In Wigmore on Evidence, (2d Ed.) Vol. 1, Sec. 15, the rule here applicable is clearly stated:

> "On this subject three different rules are found competing for recognition in the different jurisdictions.
>
> "(1) The first is that *the admission of an inadmissible fact, without objection by the opponent, does not justify the opponent in rebutting by other inadmissible facts*: * * *
>
> "(2) At the other extreme is a rule which declares that in general precisely the contrary shall obtain, *i.e. the opponent may resort to similar inadmissible evidence*: * * *

"(3) A third form of rule, intermediate between the other two, is that the opponent may reply with similar evidence *whenever it is needed for removing an unfair prejudice which might otherwise have ensued from the original evidence*, but in no other case. This seems to be the true significance of what may be called the Massachusetts rule: * * *

" * * * This points to the true rule, namely, that since each party is alike in the condition of 'volenti non fit injuria', *neither can complain of a ruling either admitting or rejecting*, — a waiver being predicable of both. The matter is thus left in the hands of the trial Court. Modify this in certain cases by conceding to the opponent, as of right, to use the curative counter-evidence when a plain and unfair prejudice would otherwise have inured to him, and the rule will be sufficiently flexible."

The same rule is reflected in Jones on Evidence, (2d Ed.), Sec. 172, pp. 192-3, the substance of which is as follows:

" * * * Testimony which would be clearly irrelevant or incompetent if offered by one party in the first instance may become very pertinent in a rebuttal or in explanation of evidence offered by the adversary."

The same is set forth in 16 C. J., Sec. 1111, p. 571, as follows:

"Evidence is sometimes admitted, or its admission is held not error, on the ground that similar evidence has been introduced, or proof of the same character has been made, by the adverse party. This is but common fairness. The rule is applicable even where the evidence first introduced

> by the adverse party should not have been received, on account of its being incompetent, irrelevant, immaterial, or hearsay."

The same rule is repeated in 22 C.J.S., Sec. 660, Pgs. 1040-1 and 31 C.J.S., Sec. 100, p. 913.

In *Bogk v. Gassert*, 149 U.S. 17, 37 L.Ed. 631, the rule is recognized, and the Court after first stating that the plaintiff was allowed to testify over the defendant's objection as to a conversation occurring prior to a written agreement says:

> "In rebuttal, Steele and Gassert were put upon the stand and asked as to the conversation which took place at the attorney's office at the time the deeds and contract to re-convey were made. This conversation was admitted, and defendant excepted. Now, while this might have been improper as original testimony, it would have been manifestly unfair to permit Bogk to give his version of the transaction, gathered from conversation between the parties, and to deny the plaintiffs the privilege of giving their version of it. The defendant himself, having thrown the bars down, has evidently no right to object to the plaintiff having taken advantage of the license thereby given to submit to the jury their understanding of the agreement."

The rule is likewise strongly affirmed in *Bradley v. Adams Express Co.*, (C.C.A. 6) 89 Fed. (2d) 641 [cert. den. 302 U.S. 698] where the Court, after quoting from Corpus Juris to the same effect as above

noted, and from the citations on Wigmore we have before referred to, states:

> "The trial court was of the impression that the testimony injected into the record by the appellants was of such a character that in a spirit of fairness the appellees should be entitled to meet it.
>
> "Under the circumstances, the court's ruling was justified."

The rule is likewise supported in principle by the following cases: *Ward v. Blake Manuf'g Co.*, (C.C.A. 8) 56 Fed. 437, 441; *Atchison, T. & S. F. R. Co. v. Reesman*, (C.C.A. 8) 60 Fed. 370, 376; *Stevenson v. U. S.*, (C.C.A. 5) 86 Fed. 106, 111; *Warren Live Stock Co. v. Farr, et al*, (C.C.A. 8) 142 Fed. 116, 117; *Emanuel v. U. S.*, (C.C.A. 2) 196 Fed. 317, 322; *Pandolfo v. U. S.*, (C.C.A. 7) 286 Fed. 8, 18 [cert. den. 261 U. S. 621]; *Gin Bock Sing v. U. S.*, (C.C.A. 9) 8 Fed. (2d) 976, 978; *Vause v. U. S.*, (C.C.A. 2) 53 Fed. (2d) 346, 352 [cert. den. 284 U. S. 661]; *Brink v. U. S.* (C.C.A. 6) 60 Fed. (2d) 231, 234 [cert. den. 287 U.S. 667]; *U.S. v. Rollnick*, (C.C.A. 2) 91 Fed. (2d) 911, 918; *Twachtman v. Connelly*, (C.C.A. 6) 106 Fed. (2d) 501, 506; *State v. Ripley*, 32 Wash., 182, 188.

It is evident that there was no abuse of the Court's discretion in admitting G. Ex. 98 under all the circumstances.

In any event, inasmuch as all of the matters reflected in the letter were otherwise established in the case, there is no prejudice to appellant in G. Ex. 98's being admitted. *Enrique Rivera v. U. S.* (C.C.A. 1) 57 Fed. (2d) 816, 820.

Income Tax Returns — Assignment of Error No. 3

Appellant's assignment of error No. 3 asserts the Court erred in admitting G. Exs. 110-G, 110-H and 110-I, appellant's income tax returns for 1937, 1938 and 1939 respectively. This claim is fully answered by *Shushan v. U. S.*, (C.C.A. 5) 117 Fed. (2d) 110 [cert. den. 314 U.S. 706], as well as *Stroud v. U. S.*, 251 U. S. 15; 64 L.Ed. 103; *Czarlinsky v. U. S.*, (C.C.A. 10) 54 Fed. (2d) 889 [cert. den. 285 U. S. 549], which in principle are against appellant's position.

Likewise, the claimed error which is predicated upon the basis of self-incrimination was rendered harmless when the defendant took the stand and testified on direct in detail concerning his financial worth, and was cross-examined without objection as to his income for the years covered by the income tax returns (Tr. 1388). The income tax returns were certainly material and relevant to the Government's circumstantial negative evidence in traverse of the repre-

sentations made in the sales campaign that Meyers was a multi-millionaire, a millionaire and a man of great personal resources who could well afford to, and would, give Frenchman Hills a thorough and adequate test by the drill.

If appellant wished to preserve his point of self-incrimination when he filed his income tax returns, the objection should have been raised in the return. *U. S. v. Sullivan*, 274 U.S. 259.

The Troeger Transaction—Assignment of Error No. 4

The above assignment of error complains of a portion of the testimony of Ernest A. Troeger, a Government witness (Tr. 899-932). The assignment of error is predicated upon the fact that the testimony was, "incompetent, immaterial and too remote, the only purpose for said testimony apparently was to show a similar scheme and device."

Appellant does not recognize the true ground on which the evidence was offered, and upon which it was admissible. The evidence was clearly admissible upon the ground that it was relevant and material to show that appellant was not, shortly after he returned from Europe, in possession of a large amount of funds as he had asserted; that Meyers was then, as during the Peoples Gas & Oil sales promotion scheme, only a pro-

moter and not a financier; as showing the whole of the Translux transaction in order to show Meyers' relationship to it as bearing upon the representations made in the sales campaign that Meyers was a philanthropist, a great and experienced man with high ideals and motives, a financier and a multi-millionaire, and his experiences in the world of business and finance.

All the foregoing in turn was relevant and material as bearing upon Meyers' intent in allowing and fostering the making of the flagrant misrepresentations concerning him in the sales campaign. This is the true ground upon which the evidence was clearly admissible.

Appellant's view that the evidence was of an unrelated, similar scheme and device is thus ill founded.

The substance of the rules relating to relevancy and materiality are set forth in 22 C.J.S., Sec. 600, p. 918, 919, where it is said:

> "While relevancy is not the exclusive test of admissibility, it is, in the main, the principal test * * *. The determination of whether or not the proffered evidence is relevant rests largely in the discretion of the trial court. Broadly stated, the test of relevancy of proffered evidence is whether it tends to cast any light upon the crime charged, * * *."

Ordinarily remoteness in time affects the weight

rather than the admissibility of the evidence, and where the evidence is circumstantial, as here, such evidence is admissible even though it tends only remotely to establish an ultimate fact. *Clune v. U. S.*, 159 U.S. 590, 40 L.Ed. 269; *Wood v. U. S.*, 16 Pet. 342, 10 L.Ed. 987, pp. 994-5; *Louie v. U. S.*, (C.C.A. 9) 218 Fed. 36, 41; 22 C.J.S., Sec. 638, pp. 977-9.

Evidence which is competent and relevant is not rendered inadmissible because it incidentally proves, or tends to prove, the defendant guilty of another and distinct crime. *Johnston v. U. S.*, (C.C.A. 9) 22 Fed. (2) 1, 5; *Miller v. U. S.*, (C.C.A. 9) 47 Fed. (2d) 120, 122; 22 C.J.S., Sec. 683, pp. 1094, 1095.

It should, however, be pointed out that the Government's proof in this connection did not show, or tend to show, any other crime on Meyer's part and no one so contended at the trial.

The Court admitted the evidence as bearing on the appellant's intent (Tr. 912-3), and later concluded the ruling was correct (Tr. 1455). That the matter was material is shown by the fact that the Translux transaction was referred to in appellant's opening statement as one of the factors which appellant would prove as showing that he was a man of great accomplishments, of high ideals and a financier, and as

tending to show the representations made in the sales campaign were true (Tr. 165).

Appellant's testimony when he took the stand included his views of the Translux incident (Tr. 1311, et seq; 1315). There is authority for the proposition that error, if any, was cured when the defendant was examined by his own counsel, as well as cross-examined relative to the same matters. *Sloan v. U. S.*, (C.C.A. 8) 31 Fed. (2d) 902.

It should be noted that the witness testified, all without objection, to the formation of the Translux Company, of meeting Meyers in 1917, that Meyers represented himself as a man of means who had just returned from England who was looking for places to put his money and would see the Translux proposition through (Tr. 899). Also, without objection, the witness identified G. Ex. 101, which shows Meyers being elected as vice president and a member of the board of directors of Translux Company, as well as other details showing his active participation therein. This exhibit also shows that the inventor of the process, J. F. R. Troeger, was to be retained as technical adviser for two years on a salary. Likewise without objection, the witness testified that Meyers acquired stock in the corporation, giving notes in the amount of $7,500 therefor, that the $6,000 note became due,

was not paid, and he talked to Meyers several times requesting payment of the overdue note.

Again without objection, G. Exs. 103-6 were admitted. These were all letters signed by Meyers showing his inability to meet the $6,000 note. Without objection, the witness testified that Meyers said he could not pay the note; that there were two additional corporations formed; that the control of the Translux Company passed to Meyers when he purchased the stock with the notes; that J. F. R. Troeger was to be given his position for two years on a salary; that Meyers promised to take care of him; that they would all make lots of money; and that J. F. R. Troeger believed his statements and would sign anything Meyers asked him to.

G. Exs. 108 and 109, to which objection was made, directly stem from G. Ex. 101, which was admitted without objection. These were clearly competent to show the whole of the transaction. G. Ex. 110, the conclusion of the transaction, was offered to show over Meyers' own signature that he was in fact only a promoter and not a financier, (he is designated in that exhibit as a promoter) and that Meyers did not in fact pay the $6,000 note, but that all of Troeger's claims against him were compromised by

Meyers paying him $300.00 and the issuance of some stock.

May we repeat that the evidence was admissible as bearing upon Meyers' intent in allowing the grossly fraudulent misrepresentations to be made in the sales campaign as to his very fine background, that he was a financier, his financial worth and as showing that he knew that such representations were not true. The evidence was thus admissible upon Meyers' knowledge of the falsity of such representations, as well as the representations personally made by Meyers as to his worth and background when he returned from England in about 1917, and thus upon Meyers motives and intent.

Final Report re Golden Gate Bridge — Assignment of Error No. 5

Appellant's objection to the admission of G. Ex. 95 in evidence is not tenable This exhibit was identified by the Secretary of the Golden Gate Bridge and Highway District as the final official report of Joseph B. Strauss, chief engineer of the bridge, authorized and paid for by the Golden Gate Bridge District, and is merely the last report completing the interim reports by Strauss as chief engineer contained in G. Ex. 94 which was admitted without objection (Tr. 621).

It was offered, as was G. Ex. 94, to show that Meyers was not mentioned in connection with the Golden Gate Bridge by Strauss in his official reports in traverse of the representations during the sales campaign that Meyers was primarily responsible for its construction.

In any event, however, if there was error in the admission of this exhibit, it was harmless in view of appellant Meyers' taking the stand and submitting himself to cross-examination on the question of what, if anything, he did to further the bridge project. As shown by the record, he was unable to show that he did a single material thing to further the project (Tr. 1311-90). *Mitchell v. U. S.*, (C.C.A. 9) 23 Fed. (2d) 260, 263 [cert. den. 277 U.S. 594]; *Temperani v. U. S.*, (C.C.A. 9) 299 Fed. 365, 367; *Dean v. U. S.*, (C.C.A. 5) 246 Fed. 568, 574-5.

Restriction of Cross-Examination of John S. Swenson — Assignment of Error No. 6

Appellant here complains of the Court's ruling in restricting his cross-examination of John S. Swenson, the Postal Inspector who had charge of the case. The claimed error is two-fold and falls into two separate categories.

The first error alleged is that the Court sustained

the Government's objection to a question to the witness concerning his activities in connection with the grand jury. The question propounded by appellant, in substance, was that when the grand jury was in session in the Fall of 1937 and it was rumored they were considering an indictment in this case, wasn't it true that hundreds of people asked permission to appear before the grand jury, and wasn't it true the witness told those people that he assumed the responsibility of telling them that they couldn't go before the grand jury in opposition to the issuance of an indictment (Tr. 890).

To this question the Government objected that what the grand jury does is its own business, and that the question had no bearing on the case, which objection the Court sustained. Appellant voiced an objection, but did not state the grounds therefor. No exception was allowed by the Court (Tr. 890-1). No statement was made by appellant as to what was intended to be shown by the inquiry, nor was any offer of proof made with respect thereto, nor suggestion made that the matter be pursued by further questioning of the witness in the absence of the jury to show the purpose of the inquiry and its admissibility.

It should be observed that the indictment herein was not returned in the Fall of 1937, but on Decem-

ber 2nd, 1938 (Tr. 2, 68). The question, therefore, did not bear upon the indictment upon which the appellant was here tried. The reference to the 1937 grand jury was apparently in connection with the first indictment returned in this case, which is not reflected in the transcript herein. Based upon this ground alone, the question was not material or relevant.

The question is susceptible of being interpreted as an attempt to show that the grand jury action was not warranted because of the exclusion of witnesses seeking to be heard, thus laying the foundation for an argument to the jury that the grand jury had not acted with all of the available evidence before it. Obviously this method of making such a showing would be improper irrespective of any other remedy open to appellant on such an issue.

Appellant having failed to give any reasons for the grounds of his exception, or to make any statement as to what was intended to be shown, as clarifying the question, this assignment of error cannot be reviewed. *Brown v. U. S.*, (C.C.A. 9) 9 Fed. (2d) 589; *Sacramento Suburban Fruit Lands Co. v. Miller*, (C.C.A. 9) 36 Fed. (2d) 922; *Central Supply Co. v. Carter Clothing Corp.*, (C.C.A. 3) 35 Fed. (2d) 172; *McVeigh v. McGurren*, (C.C.A. 7) 117 Fed. (2d) 672 [cert. den. 313 U.S. 573].

The restriction of cross examination being in the sound discretion of the trial Court, it is submitted that there was no manifest abuse of discretion under all the circumstances. *Lau Foo Kau v. U. S.*, (C.C.A.9) 34 Fed. (2d) 86; *Gates v. U. S.*, (C.C.A. 10) 122 Fed. (2d) 571, 577 [cert. den. 314 U.S. 698]; *Delno v. Market St. Ry Co.*, (C.C.A. 9) 124 Fed. (2d) 965, 967; *Glasser v. U. S.*, 315 U. S. 60, 83.

In any event, however, if it was error it was harmless in view of all the evidence, and particularly as the defendant in his case in chief did not attempt to offer any evidence whatsoever to the same effect or even remotely tending to show bias or prejudice on the part of the witness Swenson. See trial Court's discussion (Tr. 1456). *Sawyear v. U. S.*, (C.C.A. 9) 27 Fed. (2d) 569, 571.

Alford v. U. S., 282 U. S. 687, cited by appellant, is not in point as the occupation and environment of the defendant as bearing on his bias and credibility is not here present, nor is the factor of showing that he hoped for some reward from the Government a factor as it was in the cited case.

In any event, the question had but slight bearing on the issue of bias and credibility and does not constitute reversible error. *District of Columbia v*

Clawans, 300 U. S. 617, 632.

The second error argued under the above assignment is that the Court should have allowed appellant to show through cross-examination of the witness Swenson that the witness opposed a stay of execution of sentence as to the defendant William Markowitz when the matter was before the District Court on November 26th, 1941 (Tr. 890-898). A reading of appellant's offer of proof shows that appellant was in no wise concerned with that proceeding, which was with reference to the judgment and sentence of the defendant Markowitz and the defendant Simons, who were convicted in the first trial of this cause in 1939 (Tr. 71). In the first trial the jury disagreed as to appellant Meyers (Tr. 70). The re-trial of this cause as to Meyers alone did not begin until October 5th, 1942 (Tr. 71).

Any recommendations or views of Mr. Swenson with regard to Markowitz or Simons certainly was not competent or relevant as to his bias or prejudice, if any, against appellant Meyers. Besides the record in this case reflects that Mr. Swenson merely urged that the sentence of Markowitz and Simons be put into effect as soon as possible in view of the unusual delay in the commencement of their sentence. It is evident that none of the evidence which appellant thus sought

to introduce would have shown any bias or prejudice against appellant.

Admission of Government's Exhibit 23 — Assignment of Error No. 7

This assignment of error relates to the admission of G. Ex. 23 (Tr. 221). It should be observed that the witness Hurwitz without objection testified that the resolution of the Northwest Gas & Oil Association (G. Ex. 21), which was obtained by Meyers and others under misrepresentations (Tr. 224-6) was later rescinded, and that G. Ex. 23 was the letter signed by the witness by the authority of Luther Weden rescinding such resolution, and which was mailed to the Oil Company and the Development Company (Tr. 220).

The only objection made thereto is that it was "incompetent" (Tr. 221). Such a general objection is insufficient to present any question for review. *Miller v. U. S.*, (C.C.A. 9) 4 Fed. (2d) 384; *Hart v. U. S.*, (C.C.A. 9) 11 Fed. (2d) 499; *Panzich v. U. S.*, (C.C.A. 9) 65 Fed. (2d) 550.

Aside from that point, however, the colloquy ensuing between the Court and counsel concerning the admission of the exhibit clearly indicated that the only ground for the objection urged was that the letter was written prior to the termination of the sales campaign

(Tr. 221). This specification was erroneous as the letter was date March 17th, 1936, and the sales campaign did not close until April 15th, 1936 (Tr. 246, 294-5). The assignment is thus without merit.

The Rejection of Defendant's Exhibits A-122, A-123 and A-131 — Assignments of Errors Nos. 8, 9 and 10

Assignments No. 8 and 9 deal with the Court's rejection on cross-examination of two letters, Dfts. A-122 and A-123, the first being a letter written by government witness Blodgett to W. A. Broome as president of the Oil Company (Tr. 1124) and the reply of Broome thereto (Tr. 1126).

The Government's direct examination of the witness was extremely brief. It consisted of the witness identifying himself as an engineer and geologist, that he never authorized the use of his name as a member of the purported Geological Advisory Committee widely advertised by the defendants in the scheme, that the witness wrote and ordered the use of his name to cease, which letter was acknowledged (Tr. 1129).

Appellant's cross-examination consisted solely of having the witness identify exhibits, some of which were admitted (Tr. 1124-5). The exhibits of which complaint is made clearly were not within the scope of direct examination, and did not even remotely pur-

port to impeach or bear on the credibility of the witness. The record fails to disclose any objection whatsoever to the rejection of either exhibit by the Court (Tr. 1124), and the errors, if any, are not subject to review. *Clark v. U. S.*, (C.C.A. 9) 245 Fed. 112; *Alvarado v. U. S.*, (C.C.A. 9) 9 Fed. (2d) 385; *Hemphill v. U. S.*, (C.C.A. 9) 112 Fed. (2d) 505, 507 [remanded on other grounds, 312 U. S. 657, and aff'd. 120 Fed. (2d) 115].

The same witness was later called as a witness for the defendant (Tr. 1192-1204), and no effort was made to introduce the exhibits nor to attack the credibility of the witness. These factors operate as a waiver under the rule that error in exclusion of evidence is not prejudicial when an opportunity is given to introduce the evidence which is not availed by the defendant. 24 C.J.S. Sec. 1918, Note 20.

Assignment of Error No. 10 is based on the rejection of defendant's A-131, which was a letter from W. A. Broome to government witness Roberts, which was excluded on appellant's cross-examination of such witness. The exhibit does not in any way bear upon the direct examination of the witness, and is clearly without its scope. The record reflects no objection or exception to the rejection of this exhibit (Tr. 1133). Review is foreclosed by reason of the authorities above

cited with reference to Assignments Nos. 8 and 9. The witness likewise later was called as a defense witness for appellant, and no effort was made to introduce this exhibit nor to attack his credibility (Tr. 1178-84). The arguments above noted with reference to the other two exhibits are here applicable.

We submit that there was here no prejudicial error even should the assignments be subject to review.

Denial of Appellant's Motion for New Trial — Assignment of Error No. 14

This assignment is based upon refusal of the Court to grant appellant a new trial (Tr. 72, 153). It is so well established that the refusal of the trial Court to grant a new trial is not reviewable that only a few of the numerous authorities available are here cited. *Sutton v. U. S.*, (C.C.A. 9) 79 Fed. (2d) 863; *Utley v. U. S.*, (C.C.A. 9) 115 Fed. (2d) 117 [cert. den. 311 U. S. 719].

This assignment of error is without merit.

CONCLUSION

We have not discussed any of appellant's assignments of error except those argued in his brief (App. Br. 27) upon the familiar ground that a failure to argue any assignment constitutes a waiver thereof.

We wish to point out to the Court that the trial of this case consumed approximately five weeks, in which a great mass of evidence was introduced and a wide range of inquiry covered. The number of exhibits introduced in evidence runs into the hundreds, many of which are very voluminous. The guilt of the defendant was overwhelmingly and clearly established by competent evidence. The errors urged refer to extremely few of the many exhibits introduced and offered. Under these circumstances an appellate court will not indulge in speculations as to the prejudice from alleged incompetent testimony. *Marron v. U. S.*, (C.C.A. 9) 18 Fed. (2d) 218 [aff'd. 275 U.S. 92, 72 L.Ed. 231]; *Lewis v. U. S.*, (C.C.A. 9) 38 Fed. (2d) 406.

The burden is on appellant to show that any alleged error was prejudicial to him to the extent that on the whole record his substantial rights have been denied. *Berger v. U. S.*, 295 U.S. 78; *Marino v. U. S.*, (C.C.A. 9) 91 Fed. (2d) 691 [cert. den. 302 U.S. 764]; *Coplin v. U. S.*, (C.C.A. 9) 88 Fed. (2d) 652 [cert. den. 301 U.S. 703].

This burden appellant has not sustained. *U. S. v. Trenton Potteries Co.*, 273 U.S. 393-4; *Simons v. U. S.*, (C.C.A. 9) 119 Fed. (2d) 539 [cert. den. 314 U.S. 616]; *Hemphill v. U. S., supra.*

The judgment should be affirmed.

Respectfully submitted,

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